Editor's note: 82 I.D. 414

UNITED STATES

v.

THERESA B. ROBINSON

IBLA 75-300 Decided August 25, 1975

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., declaring contestee's Howard placer mining claim void.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally -- Mining Claims: Locatability of Mineral: Generally

When the Government contests a mining claim and establishes a prima facie case that contestee has not made a discovery of a locatable mineral deposit, the burden devolves on contestee to establish by a preponderance of the evidence

that the claim has been validated by the discovery of a locatable mineral deposit.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Discovery: Marketability

A bog iron ore deposit does not meet the prudent man -- marketability test where the evidence shows that contestee could only develop the iron deposit for sale for metallurgical uses after further exploration to establish a higher grade or greater tonnage of ore, or upon future favorable developments in the iron ore market.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Locatability of Mineral: Generally

Marketability of mineral material is not the sole test of the validity of a mining claim. Profitable sales of mineral material for non-validating uses cannot be

used in determining the validity of a mining claim; the claimant must meet the prudent man -- marketability test in a market for which the material is locatable.

4. Mining Claims: Determination of Validity -- Mining Claims: Locatability of Mineral: Generally -- Mining Claims: Specific Mineral Involved: Bog Iron Ore

Bog iron ore, used as a soil conditioner or soil amendment, is not a locatable mineral deposit in the absence of a showing that it meets the test of United States v. Bunkowski, 5 IBLA 102, 113-16, 79 I.D. 43, 48-49 (1972), i.e., it is found to be not just a physical amendment to the soil but a chemical amendment which alters and improves soil or plant chemistry.

5. Administrative Procedure: Hearings -- Regulations: Generally -- Rules of Practice: Appeals: Discovery -- Rules of Practice: Evidence -- Rules of Practice: Witnesses

A motion for remand of a mining claim contest for further hearing on the grounds of prejudicial surprise, based upon Government counsel's failure to supplement interrogatory answers listing witnesses and exhibits as ordered in lieu of prehearing conference, will be denied where contestee's counsel ignored repeated offers of continuance made at various stages of the hearing.

United States v. Barngrover (On Rehearing), 57 I.D. 533 (1942), overruled in part.

APPEARANCES: Charles J. Traylor, Esq., and Richard W. Arnold, Esq., of Traylor, Palo, Cowan & Arnold, Grand Junction, Colorado, for appellant; Rogers N. Robinson, Esq. (at hearing), Richard L. Fowler, Esq., and A. Walter Wise, Esq. (on appeal), Office of the General Counsel, United States Department of Agriculture, Denver, Colorado, for respondent.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Theresa B. Robinson has appealed from the December 5, 1974, decision of Administrative Law Judge John R. Rampton, Jr., which

declared void Mrs. Robinson's Howard placer mining claim, located in section 31, T. 42 N., R. 8 W., N.M.P.M., in Uncompahgre National Forest, Colorado.

The contest began with the filing of a contest complaint on behalf of the Forest Service, Department of Agriculture, which alleged that the Howard placer mining claim was invalid because:

a. No valuable mineral deposit has been discovered within the limits of the claim.

b. The iron oxide within the limits of said mining claim is a common variety material.

[1] In order to have a valid mining claim, the mining claimant must show that he has made a "discovery" of a "valuable mineral deposit." To show a discovery, the claimant must show that he has found minerals in such quantity and quality as engender the belief that:

> * * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). To show a "valuable mineral deposit" the claimant must show that the deposit at issue is locatable under the mining law, 30 U.S.C. § 22 et seq. (1970). See United States v. Bienick, 14 IBLA 290, 297 (1974) (concurring opinion); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. Mattey, 67 I.D. 63, 65 (1960); United States v. Black, 64 I.D. 93, 96 (1957); Gray Trust Co. (On Rehearing), 47 L.D. 18 (1919); Holman v. State of Utah, 41 L.D. 314 (1912). Cf. United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963).

In Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), the Circuit Court approved the Departmental rule that:

> * * * [w]hen the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. * * *

This standard of proof is applicable to both issues of fact raised on appeal; in essence it envisages that after contestant has made a prima facie case, contestee bears the risk of nonpersuasion, i.e., the ultimate burden of proof.

With her timely answer to the contest complaint denying the invalidity of the claim, Theresa B. Robinson (contestee) through counsel moved for a prehearing conference in the case after an opportunity for full discovery. After Judge Dalby, since retired, set the case for hearing, contestee renewed the motion for a prehearing conference. After some continuances, Judge Dalby denied the request for prehearing conference, and ordered contestant to respond to any interrogatories contestee might file in lieu of a prehearing conference.

On November 2, 1972, contestee filed interrogatories asking in relevant part: (1) whether contestant contended that the claim was improperly located; (2) if contestant contended that a discovery pit did not exist on the claim; (3) whether contestant contended that the iron on the claim did not have commercial value; (4) by what theory contestant maintained that the claim had "no valuable mineral deposit;" (5) by what theory contestant maintained the iron was a common variety material; and (6) by what witnesses and documents did contestant intend to prove any or all of the issues set out in the complaint and the interrogatories.

Contestant's response to the first subject of the interrogatories was to move to amend the complaint to charge, in addition, "The claim is not distinctly marked on the ground so that its boundaries can readily be traced." The motion was granted.

Contestant also answered: that it did not contend there was no discovery pit; that the meaning of "commercial value" was unclear; that the material on the claim did not fall within the "well-defined meaning [of valuable mineral deposit] under the mining law," and it could not be mined, milled and sold for a reasonable return; and that the material was common within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). The only witness listed by contestant was A. F. Klein, Jr., a Forest Service mineral examiner.

About the same time, contestant requested a postponement of the hearing because of the unavailability of a witness other than Mr. Klein. The hearing was re-scheduled with contestee's consent, but the record does not disclose whether contestee understood that the unavailable witness was not Mr. Klein, whom contestant named in responding to the interrogatories, but an expert on soil amendments and conditioners.

In addition, contestant filed interrogatories of contestee, requesting that contestee provide information pertaining to all sales of iron ore from the claim; requesting copies of any assay reports; and the names of witnesses to be called. Contestee's response indicated that contestee's sales records had been lost, enclosed an assay certificate, and listed three certain and three potential witnesses.

Eight days later contestee supplemented her response with the names, addresses and subject matter of the testimony of five more potential witnesses. With the supplemental response, contestee noted that Rule 26, Federal Rules of Civil Procedure, imposes a continuing duty to supplement answers to interrogatories when additional information becomes available, and requested that contestant so inform contestee if new witnesses were to be called.

At the hearing, held in Grand Junction, Colorado, contestant called A. F. Klein, Jr., a Forest Service mineral examiner who twice visited the claim. He took a cut sample and a grab sample which assayed 35.1% and 30.9% iron, respectively (Exs. 5-6). He described the size and nature of the bog iron ore (limonite) deposit on the claim (Tr. 7-9). He testified that greater than 51% ferric oxide content is necessary before an iron deposit has potential value for use in steel-making (Tr. 39), and, over contestee's objection, testified that limonite bog iron deposits occur commonly in the mountains of Colorado (Tr. 44-48).

On cross-examination, Mr. Klein admitted that his opinion that there was no prospect of developing a valuable mine from the deposit was based on the value of the iron ore for paint pigment, steel-making or other industrial uses (Tr. 87-88), rather than its value in agriculture as a soil conditioner (Tr. 87, 68-69).

On redirect examination, Mr. Klein supplemented his prior testimony about how accessible and easy to mine the deposit is (Tr. 70) with cost and return figures on sales for agricultural use taken from contestee that indicated a maximum return of $52 per ton (at $2.60 per hundred pound bag) and hauling costs of $14 per ton (at 10¢ per ton-mile) from the deposit to Grand Junction (Tr. 81-82, 95, 101). He concluded that adding the cost and depreciation of equipment, contestee would be left with only a small profit (Tr. 97-101).

Contestant then called Theresa Robinson, the contestee, as an adverse witness, over objection. She testified that up to 1970, when her late husband's partner left for two years (Tr. 286-287), she sold over a hundred tons at $2.60 per hundred pounds to farmers and nursery owners as an iron supplement for the alkaline soils of western Colorado to prevent iron chlorosis on all types of farm crops and garden plants (Tr. 108-12).

Contestant then called Dr. Ewell A. Rogers, an expert in fruit tree nutrition employed at the Colorado State University Experimental Station. Contestee, on learning that Dr. Rogers had been subpoenaed the day before the hearing, objected to his testimony on the grounds that contestee was not notified he would testify as required by contestant's continuing obligation to supplement the answers to the interrogatories (Tr. 103-05, 122, 132-33). Dr. Rogers testified

that his research on tree fruit indicates that iron oxide applied as a soil conditioner does not help the plant's health, as the iron itself cannot be absorbed by the plant in its natural state. He described iron chelates, compounds in which iron is chemically available to the plant roots, as the only effective soil amendment for chlorosis (Tr. 123-25, 129).

Clyde Jones, chief chemist for the Colorado Department of Agriculture, then testified for contestant over similar objection by contestee. He testified, in his capacity as supervisor of the laboratory that analyses all fertilizers and soil additives in Colorado, that the iron oxide from the claim should have been, and was not, registered and tested as required by Colorado state law regarding commercial soil amendments (Tr. 134-35, 137-38). He also testified that limonite, no matter what its iron content, was not of any benefit to crops as a soil conditioner (Tr. 139, 142).

Contestant rested, and contestee moved that no prima facie case of invalidity had been made. The Judge ruled that based on United States v. Bunkowski, supra, contestant had presented a prima facie case that the material on the claim was not locatable as a valuable mineral deposit under the mining law. The Judge further offered contestee a continuance either at that point or when she finished presenting her case (Tr. 147).

Contestee called Albert C. Thomas, who runs a retail home supplies (firewood, rock, soil conditioners) business. He testified that he has sold comparable iron oxide material from the Iron Springs claim near the Howard placer claim and has seen its beneficial effects, mainly on flowers (Tr. 151-53). He was certain he could market the material and do so at a profit (Tr. 154, 165). On cross-examination, he indicated that the results occurred in part because the iron rendered the alkaline clay more porous (Tr. 162). He did not know what effect the iron actually had on the alkali itself (Tr. 163).

John I. Schumacher, a registered mining engineer who owns an exploration company and does mineral properties consulting work, described the claim and the locations where he took a cut sample (Ex. D) that assayed 32 percent iron, and a grab sample (Ex. E) that assayed 48 percent iron (Tr. 169-73). He indicated that the deposit could be mined at a comfortable profit (Tr. 180, 190-91), and that enough material could be stockpiled during the summer to sell all year (Tr. 184). He also testified that the spectrographic assays showed the deposit to be more than just limonite (Tr. 175, 188). He said that iron deposits once considered too low-grade for use in steel-making are now economical, including some with as little as 33 percent iron content (Tr. 194-96).

Charley Pinger, a farmer living adjacent to contestee's brother's ranch, where material from the claim was stockpiled, milled, sacked and sold, testified that "many times" he saw "truckloads" of the iron oxide delivered to the ranch until four or five years ago, and that they did a steady business selling off the stockpile (Tr. 200-02). He testified that contestee's brother revived some dying evergreen trees with material from the claim alone (Tr. 203), and that he himself used it alone (Tr. 207), and "it sure does wonders" (Tr. 203). He was unsure whether the iron ore "will neutralize the acid" or "neutralizes the alkali" (Tr. 203-04), and could only suggest that different soils account for the contestant's experts' results.

Julian D. Utter, a farmer, janitor and gardener for the highway department, testified he could not start a lawn for two years until he used material from the claim (Tr. 208-10). He testified he put in lawns professionally until 1963 on a no lawn-no pay basis and never failed when using iron oxide (Tr. 210-11). He felt that the iron oxide "dissolves the alkali" (Tr. 211, 220). He also cured his two apricot trees of yellowing by using iron oxide alone without any difference in watering (Tr. 212). After ten years working with it he is convinced it works where sulphur and "barnyard" will not (Tr. 214-15). He further testified that vegetables growing in soil to which the iron oxide has been added have iron visibly clinging to the hair roots when pulled (Tr. 216), and that the vigorous growth of such vegetables was due to the plants' using the iron (Tr. 222).

Astor Hurst, a greenhouse-nursery operator, sold "mineral fertilizer" he bought from contestee at $1.80 per 80-pound bag, used it in his greenhouse on plants grown there (Tr. 229), and would not guarantee rose bushes he sold unless they were grown in contestee's iron oxide (Tr. 230). Although he had no chemical explanation for how it worked, he knew it did and relied on it, and knew the material on the claim could be worked and sold at a profit (Tr. 232-33). He and his wife use iron oxide to the exclusion of all other fertilizers and soil amendments in their own garden, on the advice of a naturopath doctor (Tr. 228, 235).

Sid Nichols, who owns and operates Mountain States Tree Service, has used the iron oxide every year he could get it since 1956 because it prevents yellowing, prevents damage during transplanting, and remedies the iron deficiency in Grand Valley soils (Tr. 237-39). He has saved a number of bolleana trees with iron oxide (Tr. 240). Although he could not explain how the iron oxide works, he had recommended it to many who have since used it (Tr. 242).

Paul B. Oyres, who was in the nursery business, used and recommended the use of the Robinsons' iron oxide because it was high in peat moss and humus (Tr. 244), it opens up "tight soil" to let the water percolate down to the roots (Tr. 250), and it cured the yellows, which he blamed on iron deficiency in the soil (Tr. 249).

H. D. Clark, who staked and surveyed the Howard placer mining claim in 1960, testified that he saw the discovery cut in 1960 (Tr. 253), and that when he visited the claim in late 1972 he located the southeast and southwest corner stakes easily (Tr. 256). He also testified that both 10-acre portions of the claim contained a portion of the deposit. 1/

Counsel then called contestee, who clarified prior testimony referring to the claim at issue as Iron No. 3 lode claim which contestee and her husband located in 1956 on the same deposit (Tr. 264). The locator of the Howard placer claim, who employed Mr. Clark in the survey, deeded the claim to contestee after learning of the prior location on the same deposit (Tr. 263-66). She reiterated the sales figures she gave to mineral examiner Klein during his investigation (Tr. 270-71).

Lyman "Slim" Foster, who was a partner of Mr. Robinson until the latter died in 1960, continued hauling and selling iron oxide from the claim on the same basis with contestee. He testified that the actual sales records were lost between 1970 and 1972 when he had to leave his business in the custody of another (Tr. 279, 286-87). From his

1/ Mr. Clark's testimony corroborated the propriety of the Judge's dismissal of paragraph 5(c) of the amended complaint, viz., that the claim was not marked on the ground, which the Judge dismissed at the close of contestant's case (Tr. 148-49).

experience in mining, hauling and selling this iron oxide he was convinced he could make a profit selling material from the claim (Tr. 281-82, 285).

Amos Bruner testified about an episode in 1961 when newsmen covering a story on nitrogen use in growing corn photographed a corn row 11 feet tall grown in iron oxide-added soil (Ex. M). He hauled iron oxide for Boyd Robinson and never heard anyone complain about the results (Tr. 293-94, 304).

In rebuttal, contestant recalled Clyde Jones, and introduced a spectrographic test of a sample of material from the claim done under a method for determining available iron. Exhibit 9, admitted over contestee's renewed objection that the document was not noticed in contestant's interrogatory answers even though the tests were requested two weeks earlier, showed that the iron oxide ran 0.116 percent on the fertilizer test and 7.6 parts per million on the soil test (Tr. 314). In other words, if the sample ran 30 percent iron, 29-plus percent would be unavailable to the plants (Tr. 315). The sample had two pounds of available iron per ton, below Colorado's statutory standard of five percent minimum available iron (Tr. 316). He testified that chemically, iron and healthy alkali would not react together (Tr. 318), and that Grand Valley soils are not deficient in iron, but deficient in available iron (Tr. 323).

Contestant also recalled Ewell Rogers, who testified that cold water in early spring can cause chlorosis, as can excessive use of "barnyard" fertilizer or nitrogen (Tr. 349). He described in greater detail the laboratory methods by which he determined that iron oxide had no effect on the fruit trees in his experiment, although the iron chelate did (Tr. 352-56). He also testified that while he did not use iron oxide from the Howard claim, there is nothing chemically to distinguish any deposit from another as far as iron uptake in plants is concerned.

In its posthearing brief, contestant argued: (1) that the material was not locatable as the iron does not react in any way in the soil to make the soil more fertile to plants; (2) that, assuming the iron is not locatable as a soil conditioner, the evidence established that the deposit was not valuable as a source of ore for paint pigment, steel-making, or other recognized metallurgical uses of iron; and (3) that the motive for bringing the contest was not at issue. Contestee's brief argued: (1) that the material was locatable as limonite iron ore since the statute does not refer to the use to which an otherwise locatable mineral is put, and, if use is relevant, evidence of a chemical reaction in the soil met the Bunkowski test; (2) the prudent man -- marketability test was met by the evidence of market demands, past sale prices and profits, and ease of removal; (3) that as a matter of law the deposit was not a "common variety" material within the meaning of the Act

of July 23, 1955, 30 U.S.C. § 611 (1970); 2/ (4) that the claim was properly located; (5) that contestee was prejudiced by the conduct of Government counsel in ignoring the Judge's prehearing arrangements; and (6) that even if the Howard placer were declared invalid, the Iron No. 3 lode located in 1956 was still subsisting.

In his decision of December 5, 1974, Judge Rampton held: (1) that paragraph 5(c) of the amended complaint was dismissed by stipulation (Tr. 148-49); (2) that contestee did not show by a preponderance of the evidence that the material on the claim could be sold at a profit for any metallurgical use of iron ore; (3) that it is undisputed that the material from the claim has been removed and marketed at a profit; and (4) that contestant's expert witnesses presented "the best and most reliable testimony * * * on the question of the effect of bog iron on soil chemicals and plant growth." (Dec. at 8). "The testimony that the iron content of the material from the claim is not accessible or absorbed by the plants stands unrebutted." (Dec. at 9). He therefore concluded that the material on the claim did not constitute a valuable mineral deposit locatable under he mining law, and declared the Howard placer mining claim void.

2/ Contestant in its brief to the Judge did not assert the invalidity of the claim on the ground in paragraph 5(b) of the complaint, that the material was a common variety. As the issue was dropped, we make no ruling on it. See United States v. Bunkowski, supra at 112-13, 79 I.D. at 47-48.

On appeal, contestee sets out three grounds of error: (1) that the bog iron deposit does meet the marketability test when considering metallurgical uses of the iron; (2) that the Judge's finding that the iron is not a locatable mineral when put to agricultural use is erroneous because the Bunkowski case is distinguishable as a matter of law, and because the testimony of contestee's witnesses was erroneously ignored; and (3) that if the Administrative Law Judge's findings are not reversed, the case should be remanded for further proceedings to correct the prejudicial effect of contestant's failure to abide by the continuing obligation to supplement answers to interrogatories when use of new witnesses and documents is planned. Contestant's answer denied and rebutted these three allegations of error.

[2] In arguing that the bog iron deposit meets the prudent man -- marketability test for metallurgical uses of iron, contestee points to the testimony that iron ore deposits containing as little as 33 percent iron are being mined for metallurgical use (Tr. 195), and the Howard placer assayed from 32 to 48 percent iron (Tr. 66, 173-74, 185). In addition, contestee points to the nearby Iron Springs claim, sold for $40,000 in 1954, as an indicator of the value of the Howard placer, which has a comparable iron content. Contestee argues that marketability as discussed in United States v. Coleman, 390 U.S. 599 (1968), "is not the primary factor which can lay aside the [prudent man] test when prudent men would be willing

to expend time and money to further develop a mining claim, as they would be in this case." (Appeal brief at 3.)

The facts pointed to do not meet contestee's burden of proof. See Foster v. Seaton, supra. The testimony of Mr. Schumacher only corroborated that of Mr. Klein (Tr. 20, 39, 52), namely, that further exploration and mapping would be necessary in order to establish whether the Howard placer deposit might have value as iron ore in the future. He testified (Tr. 185-86):

> * * * It could be conceivable this ore might possibly be even higher grade at a greater depth. It could be conceivable it might be even in the very near future commercial as it exists now, or it might be considerably greater tonnage than is shown by acres and depth. * * *

This Board has held that a discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated. United States v. Rigg, 16 IBLA 385 (1974); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Taylor, 11 IBLA 119 (1973); United States v. Kelty, 11 IBLA 38 (1973).

In addition to the testimony that further exploration work could show the deposit to be more valuable, the evidence regarding any market demand for deposits of this quality and quantity of

ore is speculative. The date when the deposit might become marketable as iron ore is in the indefinite future, and the record lacks evidence showing the deposit at issue to be comparable in size, location and other characteristics to the deposits of similar grade iron that have recently become marketable. A mineral claimant need not be producing or selling from the mine (Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972); Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971)), but there must be an existing demand in a market the claimant has a current reasonable prospect of entering. United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972); United States v. Boyle, 76 I.D. 318 (1969); United States v. Pierce, 75 I.D. 270 (1968). We affirm the Administrative Law Judge's conclusion on this issue.

[3] Appellant argues that consideration of the value of the deposit for metallurgical uses is improper in any event because the law does not require her to market the material as metallurgical iron if she can earn a greater profit from sales for other purposes: "the test is not whether the deposit is valuable for metalliferous ore, but whether a prudent man would develop this mineral claim."

The Department has held that not all materials that can be removed from the earth and sold at a profit are locatable under

the mining laws. More specifically, mineral material suitable for base, fill or comparable uses requiring material of no particular specifications and involving only the transportation of the material from one location to another is not locatable, and even if the material is suitable for other purposes, sales of the material for non-validating uses cannot be considered in determining marketability. United States v. Bienick, supra at 293, 298; United States v. Harenberg, 11 IBLA 153 (1973); United States v. Barrows, 76 I.D. 299, 306 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Hinde, A-30634 (July 9, 1968). See United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972); cf. United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972). 3/

In United States v. Bunkowski, supra, one issue was whether or not gypsite used as a soil conditioner was locatable under the mining law. Appellant argues that Bunkowski is distinguishable because the material involved there was not a mineral. In fact,

3/ In United States v. Barngrover, supra at 534, the Department held: "* * * Consequently under the rule in the Layman case * * * any substance found in nature, having sufficient value, to be separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses is locatable and enterable under the mining laws. * * *" In United States v. Mattey, supra at 66, the Department construed Barngrover as holding that "* * * deposits of clay of an exceptional nature may be entered under the mining laws. * * *" Barngrover, as can be seen from the quotation above, was not so limited in rationale, but it remains the law as it was construed in Mattey. Insofar as it holds that marketability alone, independent of use, governs locatability, it has been overruled sub silentio by the cases cited in the text, including Mattey and Bunkowski.

the Board found that the constituent element for which the gypsite was valued was gypsum, admittedly a mineral which might support a valid discovery. However, the Board examined the use to which the gypsite was put in order to determine its locatability.

Thus, sales at a profit notwithstanding, contestee must show that a mineral used as an agricultural soil conditioner is marketable for its standard mineral uses, or else meets the Bunkowski test for locatability of materials used in agriculture. We turn now to this latter issue.

[4] In Bunkowski, the Board adopted the Bureau of Land Management's ruling that the gypsite was locatable as an agricultural soil amendment because it was not only a physical amendment, altering friability, but a chemical amendment, combining with and removing sodium to improve alkaline soils. The gypsite was thus distinguished from other "minerals" such as rhyolite and blow sand, which only served as physical amendments to soil and have been held non-locatable for such use. United States v. Story, Idaho C-010171 (August 17, 1960) (rhyolite); United States v. Jaramillo, A-28533 (February 6, 1961); Solicitor's Opinion, M-36295 (August 1, 1955) (blow sand).

The testimony of Clyde Jones and Ewell A. Rogers, recited above, demonstrated that iron ore like that from the Howard placer was not

available to plant roots, and did not react with the soil so as to neutralize or remove alkali. Their testimony established that iron is only minimally available to plant roots unless in a chelated state, which the raw iron from contestee's claim was not. In short, their testimony indicated that the iron ore did not chemically improve the alkali soil to which it was added and was not chemically available to the plants.

Contestee's rebuttal testimony was persuasive that her buyer's crop yields and plants' health improved, in some cases dramatically, after addition of the iron ore. However, in some instances the testimony did not establish that it was the iron ore that caused the improvement, rather than a change in watering practices, or the "barnyard" or nitrogen used with it. Further, in other instances the testimony did not establish that the improvements, even where causally connected to the use of iron ore, were not due to the humus content of the material 4/ or due to improved friability of the "deadpan" alkali of the region. Paul Oyres, a nurseryman, recommended contestee's iron ore because it was high in humus and opened up tight soil to let water to the roots. Albert Thomas concurred that the iron ore improved friability.

4/ Humus, or the organic portion of the soil, is, like peat or peat moss, not "mineral" and is thus not locatable under the mining law. United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963). If humus is the constituent of the bog iron deposit sought by the buyers and of value to the plants, the claim is for this reason invalid.

We affirm the Judge's finding that contestant's witnesses' "testimony is the best and most reliable testimony available in the record on the question of the effect of bog iron on soil chemicals and plant growth." (Dec. at 8.) Contestee argues that it was error for the Judge to ignore contestee's testimony and reject their observations of the iron ore's actual effects. As we indicated, the sincerity and credibility of contestee's witnesses is not rejected, and was not rejected by the Judge. (Dec. at 8.) However, their testimony that iron ore worked did not explain how it worked and did not establish by a preponderance of the evidence that the material meets the Bunkowski test for the locatability of minerals used as soil amendments.

[5] Finally, appellant requests that if the Judge's decision is not reversed, the case be remanded for further proceedings on the ground that her case was prejudiced by Government counsel's failure to supplement his interrogatory answers with the names of the expert witnesses. Contestee requests the case be remanded to allow contestee time to secure experts to examine and rebut contestant's experts' testimony, and that the "Hearing Judges" be informed that they have the power to act against prejudicial conduct by counsel practicing before them.

Clyde Jones was contacted two weeks before the hearing (Tr. 139), Ewell Rogers was contacted and subpoenaed the day before the

hearing began, and contestee was called as an adverse witness in contestant's case-in-chief without notice. 5/ Mr. Jones also prepared Ex. 9, a spectrographic sample indicating the amount of available iron in contestee's raw iron ore, for contestant. On the record counsel for contestant contemplated using Mr. Jones and contestee without notice to contestee. We do not condone Government counsel's uncooperative behavior in this case. The rules of practice of the Department are designed to promote development of a full and complete record and not to sanction use of surprise as a hearing tactic. The interrogatories in this case were ordered in lieu of a prehearing conference, which the Administrative Law Judge is explicitly authorized to conduct. 43 CFR 4.430. The limitations on the Judge's subpoena power should not be employed as a shield against prehearing disclosure, and the discovery authority of the Judge should not be so subverted. 6/ Strict compliance with both prescribed and customary procedures by Government counsel is needed to maintain the quality of justice a citizen rationally expects.

5/ We affirm the Judge's overruling counsel's objection to the use of contestee as an adverse witness (Tr. 105-06). We find such authority in 43 CFR 4.433: "The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner * * *."

6/ We would distinguish the Judges' lack of authority to issue subpoenas duces tecum from their authority to allow other forms of discovery. The only explicit limitations on the Administrative Law Judges' "general authority to conduct the hearing in an orderly and judicial manner," 43 CFR 4.433, are a prohibition against the issuance of subpoenas for depositions for discovery purposes, 43 CFR 4.26, 4.433, and 4.452-4, and a prohibition against the issuance of

However, contestee's posture is also flawed. While claiming prejudice and surprise, contestee's counsel declined numerous offers of a continuance by the Administrative Law Judge. At the close of Mr. Rogers' initial testimony, counsel was informed of his full right of rebuttal (Tr. 133). Similarly, when the Judge ruled that a prima facie case of non-locatability had been made, he stated:

> Now, it will be up to you now to either present your evidence or ask for a continuance or present your evidence and then ask for a continuance, and if you do ask for one, you'll get it if you feel there has been surprise which precluded you from properly preparing the case. * * *

---

fn. 6 (continued)
subpoenas duces tecum. Compare 43 CFR 1850.0-7 (1969) with 43 CFR 1850.0-7 (1971). Circular No. 2273, 35 FR 10011 (June 18, 1970), amending 43 CFR 1850.0-7 (1969), revoked the Judges' authority to issue subpoenas duces tecum and subpoenas for discovery purposes in public land cases. The Judges exercise such an authority only where explicitly authorized by statute. E.g., section 103(d) of the Mining Enforcement and Safety Act of 1969, 30 U.S.C. § 813(d) (1970); 43 CFR 4.586.

Except to the extent that contestee requested copies of documents to be used in contestant's case, the interrogatories filed were in the nature of prehearing conference inquiries; they were not requests for depositions and they did not require subpoenas. Since the Department's procedures in mining claim cases are governed by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970), United States v. O'Leary, 63 I.D. 341, 344-45 (1956), the Administrative Law Judges are authorized to "hold conferences" and "dispose of procedural requests." 5 U.S.C. § 556(c) (1970). Orders providing for discovery in lieu of a prehearing conference, like the interrogatories in this case, that do not require the issuance of the prohibited subpoenas, appear to this Board to lie within the Administrative Law Judges' statutory and regulatory authority.

(Tr. 147). When Exhibit 9 was introduced in rebuttal counsel was offered "full opportunity if it's necessary, even to come back here to go into this more fully, if you so desire." (Tr. 310.) Contestee never took the offered opportunity for a continuance to prepare any expert rebuttal or obtain expert advice for cross-examination.

We conclude that contestee's failure to request a continuance, which was repeatedly offered, precludes assertion of prejudice at this time. Appellant requests now what her counsel declined to request at the appropriate time. A hearing proceeding will not be reopened in the absence of a substantial equitable basis for doing so. United States v. Riesing, A-30474 (January 18, 1966); United States v. Goehring, A-29407 (July 2, 1963); J. C. Nelson, 64 I.D. 103, 110 (1957). Cf. United States v. Holcomb, A-31019 (August 21, 1969) (objection on appeal considered waived if not pursued at hearing). Similarly, the Department has rejected assertions on appeal that an issue fully litigated and understood was improperly decided because not explicitly raised by the contest complaint. United States v. Pierce, supra at 275-78; United States v. Humphries, A-30239 (April 16, 1965). Contestee's objection on the grounds of prejudice was waived at the time when it would properly have been satisfied. The request for remand is thus denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. 7/

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

7/ While Judge Lewis agrees with the decision herein insofar as it relates to the material involved, which is bog iron ore, she would not necessarily feel bound by such precedent in the case of a mineral such as vermiculite.